Supreme Court, U.S.
FILED
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IN THE

# Supreme Court of the United States

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SUSAN TAVE ZELMAN, Superintendent Of Public Instruction, *et al.*,
*Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*,
*Respondents*.

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HANNA PERKINS SCHOOL, *et al.*,
*Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*,
*Respondents*.

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SENEL TAYLOR, *et al.*,
*Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR RESPONDENTS DORIS SIMMONS-HARRIS, *ET AL.*

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## QUESTIONS PRESENTED

The Ohio Voucher Program authorizes the State to issue tuition voucher checks to parents of selected Cleveland children admitted to private schools registered to participate in the Program—the overwhelming majority of which are sectarian private schools providing a religious education—that the parents then endorse over to the schools. The Establishment Clause Questions Presented are:

1. Whether the moneys the Voucher Program provides to participating sectarian private schools are "properly attributable to the State," *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 489 (1986), as a form of "an impermissible 'direct [State] subsidy' " to the schools, *id.* at 487, or are "a permissible [parental] transfer" to the schools "similar to [a] hypothetical salary donation" by a government employee from a government paycheck to a religious institution, *id.*?

2. Whether the Voucher Program has "the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination," *Agostini v. Felton*, 521 U.S. 203, 231 (1997)?

3. Whether the Voucher Program impermissibly "confer[s] a[ ] message of [S]tate endorsement of religion." *Witters*, 474 U.S. at 489?

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## BRIEF FOR RESPONDENTS DORIS SIMMONS-HARRIS, *ET AL.*

## STATEMENT OF THE CASE

### A. Statement of Facts

The Ohio Pilot Project Scholarship Program ("Voucher Program" or "Program") authorizes the State to issue tuition voucher checks to the parents of selected children residing within the Cleveland City School District ("CCSD") in kindergarten through eighth grade. State Pet. App. 4a. These tuition voucher checks can only be applied towards the payment of tuition at a *private* school that: (1) is located within the boundaries of the CCSD; (2) is registered to participate in the Program by the Ohio Superintendent of Public Instruction; and (3) has admitted the parents' child to the school in accordance with a set of Program "priority rules"—which, *inter alia*, require the school to give preference to children from low-income families. *Id.* 4a-5a. "The [P]rogram requires participating private schools to cap tuition at $2500 per [voucher] student per year and pays 90% of whatever tuition the school actually charges [within the capped amount] for low-income families; for other families, the State pays 75% of the school's tuition up to a maximum of $1875." *Id.* 4a. The State mails each tuition voucher check—which designates the parents of the student as the payee and the State as the payor—directly to the participating private school, and the parents then endorse the check over to the school. *Id.*

The following factual points about the structure and operation of the Ohio Voucher Program are particularly pertinent:

1. Fifty-six private schools registered to participate in the Program during its first year of operation (*i.e.*, the 1999-2000 school year), and forty-six of those schools—or 82%—were

sectarian. State Pet. App. 5a. Moreover, "the number of available places in sectarian schools is higher than 82%, as many of the sectarian schools are larger and provide a greater number of places for children in the voucher program." *Id.* 26a. Thus, "close to 96% of the [3,761] students enrolled in the [P]rogram for the 1999-2000 school year attended sectarian institutions." *Id.*

The sectarian private school participation figures under the current Ohio Voucher Program are all but identical to those under a predecessor Ohio voucher program that began during the 1996-97 school year and continued to operate during the 1997-98 and 1998-99 school years until that program was ruled invalid on independent state law grounds by the Ohio Supreme Court. *See Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). During the first year of operation of the predecessor voucher program—the terms of which were the same in all pertinent respects as the terms of the current Voucher Program—"[a]pproximately fifty-three private schools registered to participate" in the program, and "approximately eighty percent of these schools were sectarian in nature." *Simmons-Harris v. Goff*, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583, at *2 (Ohio App. 1997).

2. The predominance of sectarian schools in the Ohio Voucher Program universe of participating private schools is due to two factors. The first is that in Cleveland—as in Ohio generally, and in virtually all other jurisdictions in the United States—the substantial majority of all private schools are sectarian schools. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 24.

The second factor is that the Ohio Voucher Program caps the tuition that participating private schools may charge voucher students from low-income families at $2,500 and pays a maximum of 90% (or $2,250) of that capped tuition. *Supra* p. 1. "Practically speaking, th[os]e tuition [and payment] restrictions mandated by the statute limit the ability of



*nonsectarian* schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." State Pet. App. 25a-26a (emphasis added). As a recent United States Government Accounting Office Report concludes, "the maximum voucher amount ($2,250 for low-income students) established by the Ohio legislature at the beginning of the voucher program appears to have limited the program primarily to low-tuition religious schools." GAO Rep. No. 01-914, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee*, at 25 (Aug. 31, 2001).

3. The Ohio Voucher Program is framed in terms that permit the participation of *public* schools in suburban *public* school districts adjacent to the CCSD that charge tuition to out-of-district residents, "if the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the district intends to admit [voucher] students . . . for the ensuing school year." Ohio Rev. Code Ann. § 3313.976(C) (1999), *reprinted in* State Pet. App. 174a-75a. But no adjacent suburban public school district—indeed no adjacent suburban public school—ever has participated in the Program. State Pet. App. 5a. It is for the foregoing reason that we have stated as an accurate description of the Program as an operating reality that it is a Program that provides tuition voucher checks that "can only be applied towards the payment of tuition at a *private* school." *Supra* p. 1.

In this instance, the current Ohio Voucher Program situation is identical—and not just nearly identical—to the predecessor voucher program situation. During the three school years that the predecessor program was in operation, no adjacent suburban public school district—indeed no adjacent suburban public school—ever participated in the program. *See* State Pet. App. 63a.

4. "[I]t can generally be said that a central part of each [participating sectarian private] school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience." State Pet. App. 64a.

> The [participating sectarian private] schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects. The sectarian schools also follow religious guidelines, including instruction in religion and mandated participation in religious services. [*Id.* 6a.]

In support of these factual findings, the decisions below provide several illustrative excerpts from the handbooks and mission statements distributed to the public by participating sectarian private schools, *see id.* 6a; 64a-69a—public distributions which the Ohio Voucher Program dictates may not be "false or misleading." *See* Ohio Rev. Code Ann. § 3313.976(A)(7) (1999), *reprinted in* State Pet. App. 174a.[1]

5. The Ohio Voucher Program moneys that flow to participating private schools *are entirely unrestricted*, and may be used by the participating sectarian private schools for whatever purposes the schools deem necessary and appropriate—including the payment of salaries and expenses of school administrators, teachers and other personnel (including members of religious orders) affiliated with the school's religious mission; the purchase of religious icons, prayer books and other materials identified with the school's

[1] In the course of their argument that the participating sectarian private schools are not "excessive[ly]" religious, *see* Hanna Perkins Br. at 45, the Hanna Perkins Petitioners acknowledge that the factual findings quoted in text are entirely accurate. - *See id.* at 44 ("Are the religiously affiliated non-public schools registered to participate in the Ohio Program truly religious? Of course they are. They have prayer, religious symbols, devotional exercises, and seek to instill strong fundamental values.").



religious mission; the maintenance and construction of facilities used for religious purposes; and other expenditures that support or maintain religious education, indoctrination, worship, and other religious activities.

**B. Proceedings Below**

On cross motions for summary judgment, the District Court held that the Ohio Voucher Program violates the Establishment Clause of the First Amendment to the United States Constitution—finding that "[i]n all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down [on Establishment Clause grounds] in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973)." State Pet. App. 123a. In so holding, the District Court rejected Petitioners' arguments invoking certain of this Court's post-*Nyquist* Establishment Clause cases—concluding that "[t]his case is unlike any" of those post-*Nyquist* cases. *Id.* 125a; *see also id.* 94a-117a.

The Sixth Circuit affirmed the District Court's Establishment Clause ruling, over the dissent of Judge Ryan. The panel majority agreed with the District Court that *Nyquist* "is on point with the matter at hand," *id.* 13a, and that the post-*Nyquist* Establishment Clause cases relied on by Petitioners are not, *id.* 27a-29a; *see also id.* 17a-23a.[2] Accordingly, the panel majority held that *Nyquist* "governs our result." *Id.* 24a. In dissenting, Judge Ryan took the position that *Nyquist* is not on point, *id.* at 36a-39a; that "the rule of law upon which *Nyquist* was decided has changed" in any event, *id.* 39a; and that the Ohio Voucher Program passes constitutional muster under that "changed" rule of law, *id.* 40a-55a.

The Sixth Circuit denied *en banc* review. *Id.* 166a-67a.

[2] The Sixth Circuit's analysis of this Court's post-*Nyquist* cases encompassed *Mitchell v. Helms*, 530 U.S. 793 (2000), which was decided while this case was on appeal to that Circuit.

## SUMMARY OF ARGUMENT

### I.

"[A]id to a religious institution unrestricted in its potential uses, *if properly attributable to the State*, is clearly prohibited under the Establishment Clause." *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 489 (1986) (emphasis added) (internal quotations omitted). Such aid violates the "absolute" Establishment Clause prohibition against "government-financed . . . indoctrination into the beliefs of a particular faith." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985). *Infra* pp. 12-13.

As the Court of Appeals correctly held, the Ohio Voucher Program aid to sectarian private schools providing a religious education *is* properly attributable to the State, and the Program *does* violate the Establishment Clause.

Where a State program makes direct unrestricted government payments to sectarian private schools providing a religious education based on the number of students attending such schools, it is patent that the program provides "aid to [those] religious institutions unrestricted in its potential uses" that is "properly attributable to the State," and it is equally patent that the program violates the Establishment Clause. And, that is true where the State is at the same time providing identical or comparable financial assistance to secular private schools and to the State's free public schools—either through multiple State funding programs or a single comprehensive State funding program. *Infra* pp. 14-17.

Where, as here, aid to sectarian private schools providing a religious education flows through third parties such as students or parents, an inquiry into the structure and operation of the program is necessary to determine whether the aid is "properly attributable to the State." As the Court pointed out in *Witters*, it is the case that "[a]id may have th[e] [impermissible] effect [of "a direct subsidy" to religious



institutions "from the State"] even though it takes the form of aid to students or parents," *Witters*, 474 U.S. at 487, but it also is the case that "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed [by a third party] to a religious institution," *id.* at 486. *Infra* p. 17.

Against this background, the inquiry in a State tuition voucher program case like this one is whether the moneys the voucher program provides to participating sectarian private schools are "properly attributable to the State," *Witters*, 474 U.S. at 489, as a form of "an impermissible 'direct [State] subsidy'" to those schools, *id.* at 487, or are "a permissible [parental] transfer" to those schools "similar to [a] hypothetical salary donation" by a government employee from a government paycheck to a religious institution, *id.* *Infra* pp. 17-18.

Under this Court's decisions in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), its companion case, *Sloan v. Lemon*, 413 U.S. 825 (1973), and *Witters*, the answer to that inquiry is that the moneys the Ohio Voucher Program provides to participating sectarian private schools are "properly attributable to the State" as a form of "an impermissible 'direct [State] subsidy'" to those schools. As was true of the tuition grant programs struck down in *Nyquist* and *Sloan*—and not true of the tuition grant program upheld in *Witters*—the Ohio Voucher Program is so heavily "skewed towards religion," *Witters*, 474 U.S. at 488, as to make it inevitable that, no matter what "private choices," *id.* at 487, individual Voucher Program parents make, a "significant portion of the aid expended under the . . . [P]rogram as a whole will end up flowing to religious education," *id.* at 488. The Ohio Voucher Program dictates that result with the same certainty as would a State program that made direct unrestricted

government payments to the same universe of private schools based on the number of students attending those schools. *Infra* pp. 18-23.

In this respect, the decisions in *Nyquist*, *Sloan* and *Witters* form a coherent doctrinal whole. While the State Petitioners attempt to minimize the Court's Establishment Clause jurisprudence set forth in those decisions by attributing it to "a single decision from a generation ago in *Nyquist*," State Br. at 19, the truth of the matter is that the Ohio Voucher Program is invalid not under some aberrant outdated decision, but under the well-considered teachings of the *Nyquist*, *Sloan* and *Witters* trilogy of decisions. *Infra* pp. 24-25.

In addressing the first Establishment Clause question presented here we follow the approach taken in *Nyquist*, *Sloan* and *Witters*, and treat the Ohio Voucher Program as a separate Program that is to be judged in its own terms. The alternative approach urged by Petitioners—that the Voucher Program should be analyzed and judged as one component part of a single integrated State program to expand the educational options available to low-income Cleveland parents by funding various private *and* public schools "of choice" in Cleveland—is one that *Nyquist* specifically rejected as unsound. The Ohio Voucher Program's tuition grants "are given *in addition to* the right that [Cleveland parents] have to send their children to public schools 'totally at state expense,'" *Nyquist*, 413 U.S. at 782 n.38 (emphasis added), and the Ohio Voucher Program is thus qualitatively different from State programs providing for the funding of the free public schools. "And in any event," the Petitioners' approach "proves too much." *Id.* On Petitioners' approach, and contrary to the most basic Establishment Clause principles, the State would be allowed to make direct unrestricted government payments to sectarian private schools providing a religious education in Cleveland based on the number of Cleveland students attending such schools. *Infra* pp. 26-29.



Petitioners also argue that adjacent suburban public school districts that consistently and uniformly have declined to participate in the current or predecessor Ohio voucher programs should be included along with the participating private schools in assessing the breadth of the educational options available to Voucher Program parents and the nature of their "genuinely independent and private choices," *Witters*, 474 U.S. at 487, under the Program. That argument has no touch with reality, and would, if accepted, make a mockery of the concept of "genuinely independent and private choices" as articulated in *Witters*. *Infra* pp. 29-31.

Since *Witters*, the Court has rejected Establishment Clause challenges to government school-aid programs providing various restricted forms of non-monetary aid. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), *Agostini v. Felton*, 521 U.S. 203 (1997), and *Mitchell v. Helms*, 530 U.S. 793 (2000). Each of these decisions turned on the Court's conclusion that insofar as the evidence showed the restricted government aid provided by the program went solely to secular educational purposes. These cases are thus inapposite where, as here, the government aid takes the form of unrestricted monetary payments that "reach the coffers of religious schools," *Agostini*, 521 U.S. at 228, and are used by the recipient schools to finance their overall programs of religious education and indoctrination. *Infra* pp. 32-34.

## II.

The Ohio Voucher Program violates the Establishment Clause in two additional separate and independent ways.

First, the Voucher Program criteria that structure the universe of participating schools so constrain the educational options available under the Program that the great majority of Voucher Program parents must send their children to sectarian private schools providing a religious education in order to obtain the benefits that the Program offers. The

Program criteria thus "have the impermissible effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini v. Felton*, 521 U.S. 203, 231 (1997). *Infra* pp. 35-37.

Second, the Voucher Program is, in its structure and operation, so heavily "skewed towards religion," *Witters*, 474 U.S. at 487, that it inevitably and impermissibly "confer[s] a[ ] message of [S]tate endorsement of religion," *id.* at 489—to no less a degree than if the State had made direct unrestricted government payments to the participating sectarian private schools providing a religious education based on the number of students attending such schools. *Infra* pp. 37-38.

## III.

Petitioners make two additional arguments that are squarely foreclosed by this Court's precedents. Contrary to the Taylor Petitioners' argument, the Ohio Voucher Program cannot be upheld on the asserted ground that "the [P]rogram's primary effect is not to subsidize religion, but to broaden educational options for disadvantaged families." Taylor Br. at 28. "[This Court's Establishment Clause] cases" make clear that "such metaphysical judgments" as to *the* primary effect of a government-aid program "are [n]either possible or necessary." *Nyquist*, 413 U.S. at 783 n.39. Nor can the Voucher Program be upheld on Petitioners' argument that the Program is supported by legitimate secular purposes. In holding the tuition grant programs unconstitutional in *Nyquist* and *Sloan* by reason of their impermissible *effect* of advancing religion, the Court recognized both that the programs were supported by legitimate secular purposes and that such purposes cannot save a government-aid program that fails the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), "effect" test. *Infra* pp. 38-40.

Petitioners also attempt to demonstrate that voucher programs are an educationally sound response to the



problems in the Cleveland City School District and other urban school districts, and broach the idea that the Ohio Voucher Program should be upheld on that basis. In fact, Petitioners are wrong as a matter of educational policy—voucher programs are not a solution to the problems of urban education, but rather an impediment to the development and the funding of effective solutions to those problems. But the salient point is that this case does not present the occasion for an educational policy debate. This case must be decided on the basis of the Establishment Clause and what that Clause has to say about government financing of religious education and indoctrination. *Infra* pp. 40-42.

## IV.

Because the Ohio Voucher Program is *identical* in all constitutionally-relevant respects to the tuition grant programs struck down in *Nyquist* and *Sloan*, it would be necessary to overrule those decisions in order to sustain the Program. This is unwarranted—first, because *Nyquist* and *Sloan* are well-reasoned decisions solidly grounded in basic Establishment Clause principles—and also because they carry the added force of *stare decisis*. While *stare decisis* "is not an inexorable command," the Court has "always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). There is no such justification here. *Infra* pp. 42-44.

## ARGUMENT

### I. THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE THE PROGRAM'S AID FINANCES RELIGIOUS EDUCATION AND INDOCTRINATION AND THAT AID IS "PROPERLY ATTRIBUTABLE TO THE STATE"

The Ohio Voucher Program authorizes the State to issue tuition voucher checks to parents of selected Cleveland

children admitted to private schools registered to participate in the Program—the overwhelming majority of which are sectarian private schools providing a religious education—that the parents then endorse over to the schools. The first of the three Establishment Clause questions presented is whether the moneys the Voucher Program provides to participating sectarian private schools are "properly attributable to the State," *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 489 (1986), as a form of "an impermissible 'direct [State] subsidy'" to those schools, *id.* at 487, or are "a permissible [parental] transfer" to the schools "similar to [a] hypothetical salary donation" by a government employee from a government paycheck to a religious institution, *id.*

As we demonstrate below, the answer to this first question is that the moneys the Voucher Program provides to participating sectarian private schools are "properly attributable to the State" as a form of "an impermissible 'direct [State] subsidy'" to those schools. The Voucher Program is structured and operates in a manner that makes it inevitable that, no matter what "private choices," *Witters*, 474 U.S. at 487, individual Voucher Program parents make, a "significant portion of the aid expended under the . . . [P]rogram as a whole will end up flowing to religious education," *id.* at 488. The Voucher Program dictates that result with the same certainty as would a State program that made direct unrestricted government payments to the same universe of private schools based on the number of students attending those schools.

(A) We begin with a bedrock principle that is one of the "few absolutes" of "Establishment Clause jurisprudence"—*viz.*, that "the Clause does absolutely prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985). *See Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) ("[O]ur decisions 'provide



*no* precedent for the use of public funds to finance religious activities.'") (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring)) (emphasis added).

In *Witters*, the Court elaborated on that principle in terms that frame the salient issue here:

> [A]id to a religious institution unrestricted in its potential uses, *if properly attributable to the State*, is 'clearly prohibited under the Establishment Clause,' *Grand Rapids*, *supra*, [473 U.S.] at 395, because it may subsidize the religious functions of the institution. [474 U.S. at 489 (emphasis added).]

It is undeniable that the Ohio Voucher Program provides "aid to a religious institution unrestricted in its potential uses" that "subsidize[s] the religious functions of" the institution. Under the Program, participating sectarian private schools receive millions of dollars in such unrestricted aid with which the schools defray the costs of providing a religious education that "indoctrinat[es the schools' students] into the beliefs of a particular faith." *Grand Rapids*, 473 U.S. at 385. *See* State Pet. App. at 64a ("[I]t can generally be said that a central part of each [participating sectarian private] school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrine are an integral part of the entire school experience.").[3]

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[3] To be sure, *amici curiae* Professors Jesse Choper, *et al.* argue that because Ohio "is using fewer tax dollars to pay for an education through the [Voucher Program] than would be used to pay for a child's education at a public school . . . there is strong assurance that the [Voucher Program] will not support the religious mission of any recipient school or result in government indoctrination of religion." Choper Br. at 23. But this is a patent *non sequitur*. It does not follow from the fact that a public school spends $100 per pupil to defray *its* costs in providing a secular education that a sectarian private school that is given $50 by the State to spend per pupil must spend the entire $50 to defray its costs in providing the secular

That being so, the Ohio Voucher Program violates the Establishment Clause if the Voucher Program aid that finances religious education and indoctrination is "properly attributable to the State." *Witters*, 474 U.S. at 489. *See Agostini v. Felton*, 521 U.S. 203, 223 (1997) ("As we have repeatedly recognized, *government* inculcation of religious beliefs has the impermissible effect of advancing religion") (emphasis added).

(B) It is clear that a program pursuant to which a State makes direct unrestricted government payments to sectarian private schools providing a religious education based on the number of students attending such schools provides "aid to [those] religious institution[s] unrestricted in its potential uses" that is "properly attributable to the State." *Witters*, 474 U.S. at 489. And, such a direct-government-per-capita-payment program thus violates the Establishment Clause.

The Court so held in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), in striking down a State of New York "maintenance and repair" grant program "authoriz[ing] direct payments [of $30 or $40 per

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component of its educational program and $0 to defray its costs in providing the religious component. Beyond that, the Choper Brief's argument rests on the premise that a sectarian private school in budgeting and in making expenditures can—and does—divide the school's educational program into a secular component and a religious component, and finances the secular component first. That premise is false. Indeed, sectarian private schools make a point of providing an integrated educational program imbued with the schools' religious teachings. For precisely that reason, this Court stated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 778 (1973), that "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education." *See also Agostini v. Felton*, 521 U.S. 203, 246 (1997) (Souter, J., dissenting) ("[I]t would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of 'secular' instruction.").



pupil] to nonpublic schools, virtually all of which are Roman Catholic schools in low-income areas." The Court explained:

> No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. . . . Absent appropriate restrictions on expenditures for [religious] purposes, it simply cannot be denied that this [program] has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools. [413 U.S. at 774.]

*See also e.g. Witters*, 474 U.S. at 487 (It is "well-settled" that "the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school from the State.") (internal quotations omitted); *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) ("[A] direct subsidy [to religious schools based on the number of students attending such schools] would be impermissible under the Establishment Clause."); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (rejecting a facial challenge to a federal program of direct cash grants to institutions providing counseling services to adolescents on the ground that "nothing on the face of the [statute] indicates that a significant portion of the federal funds will be disbursed to 'pervasively sectarian' institutions," *id.* at 610, but remanding the case for consideration of "'as-applied' challenge[s]" to the use of the federal funds for "teaching or promoting religion," which usage "would violate the Establishment Clause," *id.* at 620-22).

It bears particular emphasis that a direct-government-per-capita-payment program violates the Establishment Clause both where the program makes direct per-capita payments *only* to sectarian private schools providing a religious education, and where the program makes direct per-capita payments *on the same or comparable basis* to sectarian

private schools providing a religious education, to secular private schools, and to the free public schools. "The State may not . . . pay for what is actually a religious education, even though . . . it makes its aid available to secular and religious institutions alike." *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 747 (1976) (plurality opinion). *See Nyquist*, 413 U.S. at 774 (striking down on its face New York's "maintenance and repair" grant program of direct grants both to sectarian private schools providing a religious education and secular private schools, and against the background provided by New York's payment for the maintenance and repair of its free public schools); *Bowen*, 487 U.S. at 620-22 (remanding the case for "'as applied' challenges" to the use of federal funds for religious purposes, which usage "would violate the Establishment Clause" notwithstanding the secular uses to which most of the federal funds were being put). *See also Mitchell*, 530 U.S. at 839 (O'Connor, J., concurring) ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.") (emphasis in original); *id.* at 840 (recognizing that "neutrality is not alone sufficient to qualify the aid as constitutional") (internal quotations omitted).

It follows from the above that if the State were to institute a comprehensive program designed to increase the educational options for Cleveland children by making direct unrestricted government payments to all Cleveland private and public schools based on the number of Cleveland children attending each such school, the direct payments to the sectarian private schools providing a religious education would be "properly attributable to the State," and the sectarian private school component of the comprehensive program would violate the Establishment Clause. That would be true notwithstanding the fact that the State at the same time and towards the same end was financing "magnet Cleveland public schools" providing a specialized approach or curriculum; "community



Cleveland public schools" operated by independent governing boards as opposed to the School Board for the Cleveland City School District; and traditional Cleveland public schools offering supplemental tutorial assistance.

(C) Having said that much about the well-settled Establishment Clause prohibition against direct unrestricted government aid to religious institutions, we turn now to the complexity introduced where, as here, unrestricted government aid flows to religious institutions through third parties such as students or parents. As the Court pointed out in *Witters*, it is the case that "[a]id may have th[e] [impermissible] effect [of "a direct subsidy" to religious institutions "from the State"] even though it takes the form of aid to students or parents," 474 U.S. at 487, but it also is the case that "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed [by a third party] to a religious institution," *id.* at 486.

In the latter regard, "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." *Witters*, 474 U.S. at 486-87. A government paycheck provides the employee with legal tender that the employee may spend in any manner and for any purpose that he/she chooses without any government direction or constraint. Because of this unrestricted spending authority, any of the government-paycheck-moneys that religious institutions receive is properly attributable to the employee's "genuinely independent and private choice[ ]"—and not to the government. *Id.* at 487.

The Ohio Voucher Program does not provide the parents of selected Cleveland children with legal tender to spend in any manner that the parents choose—including a donation to a religious institution. Rather, the Program authorizes the State to issue tuition voucher checks to parents of selected

Cleveland children admitted to private schools registered to participate in the Program that the parents then endorse over to the schools. It is this Program feature that generates the legal controversy before the Court.

(D) In resolving that controversy it is helpful to first consider the simplest model of a government tuition voucher program—a program that is structured and operates so that the tuition vouchers can be used at any one of a universe of participating schools composed *entirely* of sectarian private schools providing a religious education. It is plain that the tuition grants provided by this model program are the legal equivalent of direct unrestricted government payments to the sectarian private schools on a per-capita basis.

It is just as inevitable in this model 100%-sectarian-school-universe tuition voucher program as it would be in a direct-government-per-capita-payment program covering those same sectarian schools that the unrestricted government moneys the program makes available will flow to the sectarian schools. To treat the tuition grants in the model program as anything other than "an impermissible 'direct [State] subsidy,'" *Witters*, 474 U.S. at 487, to the sectarian schools would disregard a critical reality—*viz.*, that in structuring the program and setting its terms, it is the government that effectively has determined that the program moneys will be used for the purpose of financing religious education, and that a parent participating in the program has no free "spending authority" to use the tuition grant money for any other purpose.

The foregoing model government tuition voucher program *is* the Ohio Voucher Program with the following exception—the Ohio Voucher Program is structured and operates so that the tuition vouchers can be used at any one of a universe of participating schools *82%* of which (representing an even



higher percentage of the available student places) are sectarian private schools providing a religious education.[4]

The nub of the matter, then, is whether an 82%-sectarian-school-universe tuition voucher program warrants different Establishment Clause treatment than a 100%-sectarian-school-universe tuition voucher program.

(E) 1. We have traced out in some detail the doctrinal route to the foregoing question in order to put it in the proper legal context, but that question is not *res nova* in this Court. To the contrary, it was considered and answered in terms in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and its companion case, *Sloan v. Lemon*, 413 U.S. 825 (1973). Both cases raised Establishment Clause challenges to government programs of tuition grants to parents legally indistinguishable from the Ohio Voucher Program. And, in both cases, the Court concluded that the program aid that financed sectarian private school religious education *was* properly attributable to the State, and thus invalid under the Establishment Clause.

Under the tuition grant program at issue in *Nyquist*, the State of New York made "unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who sen[t] their children to [qualified] nonpublic [elementary or secondary] schools." 413 U.S. at 780. "[A]pproximately

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[4] It bears repeating that the predominance of sectarian schools in the Ohio Voucher Program universe of participating private schools is an inherently stable aspect of the Program, and that there are two reasons for this stability. In the first place, the Program is limited to private schools in Cleveland, and sectarian schools constitute the substantial majority of all such private schools. Second, the Program caps the tuition that participating private schools may charge voucher students from low-income families at $2,500 and pays only 90% of that capped tuition—unquestionably discouraging the participation of secular private schools, which generally have greater tuition needs than sectarian private schools. *Supra* p. 2-3.

85%" of the qualified nonpublic schools within the program were sectarian schools that taught "religious doctrine to some degree." *Id.* at 768.

In holding that New York's tuition grant program violated the Establishment Clause, the *Nyquist* Court began by noting that—owing to the absolute Establishment Clause prohibition on government-financed religious education and indoctrination—"[t]here can be no question that these [tuition] grants could not, consistently with the Establishment Clause, be given directly to sectarian schools." 413 U.S. at 780. "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.*

"The controlling question here, then," the *Nyquist* Court went on to say, "is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result." *Id.* at 781. In answering that question "no," the Court emphasized that "the great majority" of the qualified nonpublic schools were sectarian private schools providing a religious education, and that, therefore, "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.[5] That is so, the Court stated, even though in the case of any individual parent there is "no assurance that the money will eventually end up in the hands of religious schools." *Id.* at 786.

*Sloan* makes the same point. There, the Court invoked its holding that same day in *Nyquist* to strike down a

[5] Given the *Nyquist* Court's application of an "effect" test, the Court's use of the word "desired" in this context can only be understood as a usage that invokes the common-law rule that one is held to intend or desire the foreseeable consequences of one's actions. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954).



Pennsylvania tuition grant program that "authorize[d] the State[ ] to use tax-raised funds for tuition reimbursements payable to parents who send their children to nonpublic schools," 413 U.S. at 830-31, some 90% of which were "schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith," *id.* at 830 (internal quotations omitted).

In order "to underline the basis for our ruling in these cases," the *Sloan* Court noted the suggestion of the intervenors "that New York's law might be differentiated on the ground that, because tuition grants there were available only to parents in an extremely low income bracket, . . . it would be reasonable to predict that the grant would, in fact, be used to pay tuition," whereas "[s]ince Pennsylvania authorizes grants to all parents of children in nonpublic schools—regardless of income level . . . no such assumption can be made as to how individual parents will spend their reimbursed amounts." 413 U.S. at 831. And, the Court squarely rejected that contention:

> Our decision . . . is *not* dependent upon any such speculation [as to what individual parents might or might not do with their tuition grants]. Instead we look to the substance of the program, and no matter how it is characterized *its effect remains the same*. . . . [A]t bottom its intended consequence is to preserve and support religion-oriented institutions. [*Id.* at 832 (emphasis added).] [6]

As the Court elaborated, "Pennsylvania's law falls under the [Establishment Clause] because *its effect, inevitably*, is to advance religion." *Id.* at 833 n.8 (emphasis added).

2. Foreshadowing the future development of Establishment Clause jurisprudence, the *Nyquist* Court strongly suggested that its invalidation of the New York tuition grant

[6] As to the *Sloan* Court's use of the word "intended" in this context, *see supra* p. 20 n. 5.

program there was not to be taken as invalidating all government tuition grant programs that result in the flow of government money to sectarian private schools providing a religious education. The Court did so by reserving for future consideration the validity of programs such as "the educational assistance provisions of the 'G.I. Bill', 38 U.S.C. § 1651," that afford aid recipients a broad variegated range of secular options in addition to sectarian options. 413 U.S. at 782-83 n.38. "Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.*

In *Witters*, the Court made that suggestion into law—and in so doing illuminated *Nyquist's* Establishment Clause teachings. *Witters* involved a State of Washington vocational tuition grant program for visually-impaired students that resulted in State financing of a blind person's studies at the Inland Empire School of the Bible. The Court found the Washington program constitutionally valid, and did so on the ground that its government tuition grants—which could be applied toward the payment of tuition at a wide and variegated, largely secular, range of educational institutions—were the legal equivalent of government employee paychecks from which an employee could—as a matter of "genuinely independent and private choice[ ]"—pay tuition to a sectarian private school providing a religious education. 474 U.S. at 487.

In reaching that conclusion, the *Witters* Court drew a sharp distinction between the structure and operation of the Washington tuition grant program being upheld, and the structure and operation of the New York tuition grant program struck down in *Nyquist*—noting that the Washington



program, in contrast to the New York program, "is in no way skewed towards religion." 474 U.S. at 488.

> On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.
>
> Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly "to provide desired financial support for nonpublic, sectarian institutions." [*Id.* (quoting *Nyquist*, 413 U.S. at 783).]

In contrast to the aid-recipient parents in *Nyquist* and in *Sloan*, the aid-recipient students in *Witters* had "a huge variety" of educational options, "only a small handful" of which were sectarian educational options. 474 U.S. at 488. Given that range of educational options, and the lack of any basis for treating as inevitable the prospect that a "significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education," *id.*, the analogy of the tuition grants to government employee paychecks held. And, given that range of educational options, the analogy of the tuition grants to direct government subsidies to sectarian private schools providing a religious education failed.[7]

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[7] As Justice Powell observed in his *Witters* concurrence, *see* 474 U.S. at 492, the decision in *Witters* is consistent with not only *Nyquist* and *Sloan* but also with *Mueller v. Allen*, 463 U.S. 388 (1983). That being so—and since *Mueller* (unlike *Nyquist* and *Sloan*) did not involve a tuition

3. The decisions in *Nyquist*, *Sloan* and *Witters* thus form a coherent doctrinal whole. While the State Petitioners attempt to minimize the Court's Establishment Clause jurisprudence set forth in those decisions by attributing it to "a single decision from a generation ago in *Nyquist*," State Br. at 19, the truth of the matter is that the Ohio Voucher Program is invalid not under some aberrant outdated decision, but under the well-considered teachings of the *Nyquist, Sloan* and *Witters* trilogy of decisions. Those teachings in their essence are that a government program of tuition grants to parents/students violates the Establishment Clause where the program is so heavily "skewed towards religion," *Witters*, 474 U.S. at 488, as to make it inevitable that, no matter what "private choices," *id.* at 487, individual aid-recipient parents/students make, a "significant portion of the aid expended under the . . . program as a whole will end up flowing to religious education," *id.* at 488. This is so because the program aid that finances religious education is, in that context, "properly attributable to the State." *Id.* at 489.

We recognize that the *Nyquist, Sloan* and *Witters* decisions do not state the governing law in terms that draw a definite line of demarcation between government tuition grant programs "skewed towards religion" that fail under the Establishment Clause, and those that provide "a huge variety" of educational options, "only a small handful" of which are sectarian educational options, that pass Establishment Clause

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grant program—we simply note at this juncture *Mueller*'s reasoning and result. *See also infra* pp. 31-32. In *Mueller*, the Court upheld against an Establishment Clause challenge a Minnesota statute that entitled eligible parents to deduct from their state income taxes a broad range of education-related expenses—including private school tuition but also including many other expenditures incurred in connection with private and public schooling alike. *See* 463 U.S. at 391 & n.2. In so doing, the *Mueller* Court found that the breadth of the options available to parents under the Minnesota statute rendered that statute "vitally different from the scheme struck down in *Nyquist*." *Id.* at 398.



muster. But that is in no way a mark against those decisions. The government tuition grant program that was before the Court in each case was at or near one or the other pole of the continuum of such programs, and the Court in each case quite properly proceeded by determining the constitutionality of the program before it. As the Court put it in *Witters*:

> The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application. We acknowledged in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id.*, at 612, quoted in *Mueller v. Allen*, 463 U.S. 388, 393 (1983). Nonetheless, the Court's opinions in this area have at least clarified "the broader contours of our inquiry," [*Nyquist*, 413 U.S. at 761,] and are sufficient to dispose of this case. [474 U.S. at 485.]

The Ohio Voucher Program is at the same point of the continuum as the New York and Pennsylvania programs struck down in *Nyquist* and *Sloan*, and at the other end of the continuum from the Washington program upheld in *Witters*. Thus, to paraphrase *Witters*, "the Court's opinions in [*Nyquist*, *Sloan* and *Witters* have] clarified 'the broad contours of [the Establishment Clause] inquiry' [in a manner] sufficient to dispose of [the instant] case." [8]

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[8] Because the predominance of sectarian schools in the universe of Ohio Voucher Program participating private schools is attributable in large part to the fact that a substantial majority of all private schools in Cleveland are sectarian schools, the State Petitioners opine that "[e]ven though it struck down the Cleveland program, the Sixth Circuit might well approve, for example, a scholarship component for an educational program in Columbus, because according to recent Ohio survey results, Columbus, in contrast to Cleveland, boasts roughly equal numbers (about 15 each) of Roman Catholic and non-religious elementary schools." State Br. at 45. And, the State Petitioners then add that "[a]ny such line-

(F) 1. In addressing the question of whether the aid that the Ohio Voucher Program provides to participating sectarian private schools is "properly attributable to the State," we have—following the approach taken in *Nyquist*, *Sloan* and *Witters*—treated the Voucher Program as a separate Program that is subject to Establishment Clause analysis and judgment in its own terms.

The Taylor Petitioners, the Hanna Perkins Petitioners, and several *amici curiae* (including the United States) take issue with this approach. It is their position that the Ohio Voucher Program should not be analyzed and judged as a separate Program in its own terms, but rather as one component part of a single integrated State program to expand the educational options available to low-income Cleveland parents by funding various Cleveland schools "of choice," Taylor Br.

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drawing produces significant tensions with post-*Nyquist* understandings of neutrality and entanglement." *Id.* at 46.

At the first level the State Petitioners make the participation question simpler than it is. The predominance of sectarian schools in the Ohio Voucher Program universe of participating private schools also is attributable to the Program's financial disincentive for secular private school participation. *Supra* pp. 2-3. There is thus no assurance that the percentage of sectarian private schools participating in an Ohio Voucher Program for Columbus would be 50%, as the State Petitioners postulate.

Beyond that, and even assuming *arguendo* that the State Petitioners' hypothetical tuition voucher program for Columbus might pass muster under the *Nyquist/Sloan/Witters* principles, it does not follow that those principles are in any way unsound. The State Petitioners' aversion to constitutional doctrine that involves line-drawing is not shared by the Court. As the Court stated in *Lee v. Weisman*, 505 U.S. 577, 598 (1992), "[o]ur jurisprudence in [the Establishment Clause] area is of necessity one of line-drawing." *See also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) ("Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.").



at 48—including not only the private schools participating in the Voucher Program, but also magnet Cleveland public schools providing a specialized approach or curriculum; community Cleveland public schools operated by independent governing boards as opposed to the School Board for the Cleveland City School District; and traditional Cleveland public schools offering supplemental tutorial assistance.[9]

The dispositive response to these Petitioners/*amici curiae* is that their approach was specifically rejected as unsound in *Nyquist*. It was argued there that New York's tuition grant program passed Establishment Clause muster because that program was part of a broader "endeavor" by the State of New York "to provide comparable benefits"—and, perforce, comparable educational options—"to all parents of schoolchildren whether enrolled in public or nonpublic schools." 413 U.S. at 782 n.38. *See also id.* at 788 (arguing that New York's tuition grant program was a constitutionally-permissible "attempt to enhance the opportunities of the poor to choose between public and nonpublic education"). In rejecting that argument, the *Nyquist* Court stated:

> The grants to parents of private school children are given *in addition to* the right that they have to send their children to public schools "totally at state expense." And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause. [413 U.S. at 782 n.38 (first emphasis added; second emphasis in original).]

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[9] Although the State Petitioners also advance this argument, they do so almost as an afterthought—introducing it with the transitional "[m]oreover," and devoting only one paragraph to the argument after an extended discussion of the educational options available to Voucher Program parents under "the [Voucher] Program itself." State Br. at 27-28.

State programs that finance free public schools are qualitatively different from State programs that finance private schools. The former enable the State to carry out its responsibility to establish and maintain schools that provide students with a free public education as a matter of right. The latter provide private entities with funding to establish and maintain schools that provide paying/subsidized students with the option of a private education as an alternative to their right to a free public education.

The argument that State of Ohio funding of all Cleveland schools "of choice" should be treated as a single integrated government funding program fails precisely because of this qualitative difference. Proceeding in this manner would, as stated in *Nyquist*, "prove[ ] too much." If the Ohio Voucher Program's financing of sectarian private school religious education could be constitutionally justified by viewing the Program in conjunction with State programs for financing free public schools "of choice," it follows that a government program of direct unrestricted payments to sectarian private schools, secular private schools and free public schools "of choice" based on the number of students attending such schools also would be constitutionally justified. And, as we have shown, the Court's Establishment Clause cases make it abundantly clear that such a direct-government-per-capita-payment program's financing of sectarian private school religious education would be unconstitutional. *Supra* pp. 14-17.[10]

There is, on the other hand, an unassailable Establishment Clause logic to this Court's consistent practice of analyzing a challenged government tuition grant program in its own

[10] Moreover, as the Brief *Amici Curiae* in Support of Respondents of the Ohio School Associations ably demonstrates, the magnet and community school programs as they currently operate in Cleveland are illusory alternatives to the Voucher Program for the vast majority of low-income Cleveland parents.



terms, and of considering only the parent/student aid-recipient options in spending the tuition grant. Inasmuch as the Establishment Clause is a bar to *government* financial support of religious education and indoctrination—and not a bar to *private-citizen* financial support of religious education and indoctrination—it follows that the first Establishment Clause question posed by tuition grant programs is whether the flow of unrestricted government moneys to sectarian private schools providing a religious education is "properly attributable to the State" or to "the genuinely independent and private choices of aid recipients."

Plainly, that is a question about the spending options available to parents who in fact receive a government tuition grant under the program—and not about the school enrollment options available to all parents in the relevant community, including those parents who do *not* receive a government tuition grant under the program and thus do *not* have any government tuition grant money to transfer to a private school. As the District Court in this case aptly stated, "the concern of the [Establishment] Clause is not whether a party has choices beyond those provided by a state aid program, but whether, when one chooses a state program—perhaps over other choices—he can exercise his options within that program without being steered toward a religious institution." State Pet. App. 119a.

2. In a less far-reaching variant on the foregoing theme, Petitioners and their *amici curiae* note that the Voucher Program permits the participation of adjacent suburban public school districts that charge tuition to out-of-district residents. And, although *no* suburban public school district—indeed no single suburban public school—has *ever* participated in either the current or predecessor Ohio voucher program, Petitioners/*amici curiae* argue that these *non-participating* schools should be included along with the participating schools in assessing the breadth of the educational options

available to Voucher Program parents and the nature of their "genuinely independent and private choices," *Witters*, 474 U.S. at 487, under the Program.

This argument is fatally flawed because it has no touch with reality. The tuition voucher checks provided by the Ohio Voucher Program can *only* be applied towards the payment of tuition *at participating schools*. Plainly, the Voucher Program's permission for adjacent suburban public school districts to participate—which those districts consistently and uniformly have declined to do—does not expand the educational options that are in fact available to Voucher Program parents or alter the nature of their Program "choices."

In this respect, the Petitioners/*amici curiae* who dispute the Court of Appeals' conclusion that the structure of the Ohio Voucher Program creates "a financial disincentive for public schools outside the district to take on [voucher] students," State Pet. App. 26a, miss the point entirely. The Taylor Petitioners, for example, assert that "[t]he premise [for that conclusion] is factually inaccurate," and that "[t]he explanation for [the schools'] nonparticipation must lie elsewhere." Taylor Br. at 39.[11] But, as the Taylor Petitioners

[11] While the Court of Appeals' overall point—that the Voucher Program creates "a financial disincentive" for participation by adjacent suburban public school districts—is correct, the Court of Appeals' numbers—that these schools would receive "a maximum of $2,250" per voucher student if they did participate—are not. (The Taylor Petitioners' calculation that participating suburban public schools would receive the substantially higher per-voucher-student amount "of about $6,544," *see* Taylor Br. at 39, is incorrect as well.)

According to information on the Ohio Department of Education's official web-site, adjacent suburban public schools that participated in the Program would receive, on average, approximately $4,750 per voucher student. *See* Brief *Amici Curiae* in Support of Respondents of the Ohio School Associations. At the same time, the average cost of educating a student in these schools exceeds $9,000. *See id.* Thus, the State's own



themselves add, "[w]hether [the suburban public schools'] motivations [for non-participation] are malign or beneficent . . . should be irrelevant to [the Ohio Voucher] [P]rogram's constitutionality." *Id.*

In terms of "genuinely independent and private choices of aid recipients," *Witters*, 474 U.S. at 487, the dispositive point is this: during the six school years in which the two Ohio voucher programs have been in operation, no parent ever has been able to use a tuition voucher to send his/her child to an adjacent suburban public school. To treat an educational option that exists on paper but not in fact as relevant to the issue of the Voucher Program parents' "genuinely independent and private choices" would make a mockery of that concept as articulated in *Witters*.[12]

In this respect, this case is far removed not only from *Witters* itself, but also from *Mueller v. Allen*, 463 U.S. 388 (1983)—and the decisions below are entirely consistent with *Mueller*'s admonition that the constitutionality of a facially-neutral government-aid program does not turn "on annual reports reciting the extent to which various classes of private citizens claimed [the] benefits . . . to which they are entitled" under the program. *Id.* at 401. Following this Court's lead in *Nyquist*, *Sloan* and *Witters*—the last of which post-dated

numbers confirm that the Voucher Program does indeed create a "financial disincentive" for participation by these schools.

[12] We would also note that the Ohio Legislature could have been under no illusions regarding the prospect that adjacent suburban public school districts would opt to participate in the Ohio Voucher Program, given these school districts' record of total *non-participation* under the predecessor voucher program. Nor was the Ohio Legislature in want of the power to make the adjacent suburban public school districts and their schools participate in the Program. *See Simmons-Harris v. Goff*, *supra*, 1997 WL 217583, at *8. In light of these realities, the Ohio Voucher Program's continued permission for adjacent suburban public school district participation at the district's option is an-all-too-transparent sham.

*Mueller*—the courts below limited their Establishment Clause inquiry to an assessment of the breadth of the educational options *actually available* to Voucher Program parents. As the District Court put it, proceeding in that way "is very different than annually taking account of the number of [parents] who have availed themselves of a particular option." State Pet. App. 99a. *See also id.* ("[D]etermining whether an aid recipient has neutral options available under a program is not the same as probing how the recipient has chosen to exercise those options.").

(G) Since *Witters*, the Court has considered three Establishment Clause challenges to government school-aid programs providing various restricted forms of non-monetary aid. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000). We confine ourselves to noting these cases because they are too far removed from this case to cast any cross-light on the first Establishment Clause question presented by the Ohio Voucher Program.

In *Zobrest*, the Court held that the Establishment Clause does not prohibit an Arizona school district from providing a sign-language interpreter to accompany a deaf student to a Roman Catholic high school, pursuant to the Individuals with Disabilities Act ("IDEA"). In *Agostini*, the Court held that the Establishment Clause does not prohibit the New York City school district from sending public school teachers to sectarian private schools to provide remedial education to disadvantaged students, pursuant to Title I of the Elementary and Secondary Education Act of 1965. And, in *Mitchell*, the Court held—albeit through two separate opinions—that the Establishment Clause does not prohibit a Louisiana school district from lending educational materials and equipment to sectarian private schools, pursuant to Chapter 2 of the Education Consolidation and Improvement Act of 1981.



The salient point is that the decision in each of these cases turned on a factor that places them in a wholly different Establishment Clause category than *Nyquist*, *Sloan*, *Witters* and the instant case—*i.e.*, the lack of any evidence that the restricted government aid provided by the challenged program was being used at sectarian private schools in violation of the injunction against government-financed religious education and indoctrination.[13] As the *Agostini* Court explained:

> [T]here is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. [521 U.S. at 226-27.]

*See also Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring) ("In both *Agostini*, our most recent school-aid case, and *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968), we rested our approval of the relevant programs in part on the fact that the aid had not been used to advance the religious missions of the recipient schools.").[14]

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[13] To be sure, *Zobrest* and *Agostini* both invoke the *Witters* principle that government aid to parents/students that is used at a sectarian private school is not "properly attributable to the State" where the aid is provided under a general program "in no way skewed towards religion." *See Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 228. But to that extent, *Zobrest* and *Agostini* add nothing to *Witters* itself.

[14] In light of the Court's treatment of *Allen* both in *Mitchell* and in *Nyquist*, *see* 413 U.S. at 781-82 & n.38, 784-85, the State Petitioners' extensive reliance on *Allen*, *see* State Br. at 29, 32, 36, is badly misplaced. Here, unlike *Allen*, it most certainly is the case that Ohio Voucher

It bears particular emphasis that—in marked contrast to the Ohio Voucher Program, and the tuition grant programs in *Nyquist*, *Sloan* and *Witters*—the government aid programs in *Zobrest*, *Agostini* and *Mitchell* did *not* direct any government moneys into "the coffers of religious schools." *Agostini*, 521 U.S. at 228. That basic Establishment Clause difference explains: (a) why the Court in *Nyquist, Sloan and Witters* approached the Establishment Clause question there presented from the analytical perspective of whether the flow of government moneys into "the coffers of religious schools" was "properly attributable to the State" or to "the genuinely independent and private choices of aid recipients"; (b) why that is the proper analytical approach in this case as well; and (c) why the decisions below are entirely consistent in both their analytical approach and in their result with the Court's decisions in *Zobrest*, *Agostini* and *Mitchell*.

In short, it is the *Nyquist/Sloan/Witters* line of cases that is on-point here. And, as we have shown, this case is on all fours with *Nyquist* and *Sloan* and far removed from *Witters*. Under *Nyquist* and *Sloan*, as informed by *Witters*, it cannot be denied that the Ohio Voucher Program aid that finances religious education and indoctrination *is* "properly attributable to the State," and that the Program thus runs afoul of the Establishment Clause.

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Program aid has "been used to advance the religious missions of the recipient schools."



## II. THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE IN TWO ADDITIONAL SEPARATE AND INDEPENDENT WAYS.

### A. The Voucher Program Creates A Financial Incentive For Voucher Program Parents To Choose A Sectarian Private School Providing A Religious Education

Because Ohio Voucher Program aid finances religious education and indoctrination, and because that aid is "properly attributable to the State," the Program violates the Establishment Clause. But the fact that the universe of participating private schools is so heavily skewed towards sectarian private schools providing a religious education means that the Program also violates the Establishment Clause "in a second respect." *Agostini*, 521 U.S. at 230. As the *Agostini* Court explained, "the criteria by which an aid program identifies its beneficiaries . . . might themselves have the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Id.* at 230-31.[15]

This would, of course, be the case if the religious tenets or practices of the applicants were factored into the process used to allocate the government aid, but *Nyquist*, *Sloan* and *Witters* indicate that a program also can create such a financial

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[15] Although, as we show in text, this second respect is closely related to the first in both factual and doctrinal terms, *Agostini* makes clear that it stands as a *separate* and *independent* ground for holding that the Ohio Voucher Program violates the Establishment Clause. *See Agostini*, 521 U.S. at 230-31 ("Although we examined in *Witters* and *Zobrest* the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion."). *See also id.* at 234.

incentive if the criteria that structure the universe of participating schools—be they restrictions on the amount of the participating schools' normal tuition that the program will pay for, or restrictions on where the participating schools must be located—so constrain the available program options that the great majority of parents must send their children to sectarian private schools providing a religious education in order to obtain the benefits that the program offers.

In *Nyquist*, the Court found that while the New York tuition grant program criteria left eligible parents "absolutely free" *in theory* to spend their tuition grants on a secular education, the program criteria so narrowly constrained their available program options as *in effect* to create "an incentive [for] parents to send their children to sectarian schools." 413 U.S. at 786. Likewise, in *Sloan*, the Court found that while the Pennsylvania tuition grant program criteria did not "tell[ ] parents how they must spend the amount received," 413 U.S. at 831, the tuition grant benefit reasonably could be viewed "as an incentive to parents to send their children to sectarian schools," *id.* at 832. The *Witters* Court, in contrast, found that the Washington tuition grant program "create[d] no financial incentive for students to undertake sectarian education," because *both* in theory *and* "as a practical matter" eligible students "have full opportunity to expend [their] vocational rehabilitation aid on wholly secular education," and "rather greater prospects to do so." 474 U.S. at 488.[16]

In this second respect, the Ohio Voucher Program once again is on all fours with the programs struck down in *Nyquist* and *Sloan*, and far removed from the program upheld

[16] The Court's post-*Witters* decisions in *Zobrest* and *Agostini* are to the same effect: in both cases, the Court found that the aid program created no incentive to undertake a religious education because the program criteria gave parents the option to use their aid at *any* elementary or secondary school of their choice, be it sectarian or nonsectarian, public or private. *See Zobrest*, 509 U.S. at 9-10; *Agostini*, 521 U.S. at 231-32.



in *Witters*. Here—no less than in *Nyquist* and *Sloan*—the structure and operation of the Voucher Program so narrowly constrain the options that are available to parents who choose to participate in the Program as to leave the great majority of them no option but to send their children to sectarian private schools providing a religious education in order to obtain the benefits of the Program. Thus, "the criteria [of the Ohio Voucher Program] themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination," *Agostini*, 521 U.S. at 231, in violation of the Establishment Clause.

### B. The Voucher Program Creates A Public Perception That The State Is Endorsing Religious Practices And Beliefs

A consistent theme of Petitioners and various *amici curiae* is that the Ohio Voucher Program is acceptable under the Establishment Clause because the Voucher Program moneys that flow to sectarian private schools providing a religious education under the Program do so indirectly, thus avoiding what these Petitioners/*amici curiae* claim is the *real* constitutional infirmity in a government program that makes direct payments to such schools on a per-capita basis—*i.e.*, the public perception that the State is endorsing religious practices and beliefs. This argument is doubly defective.

A direct-government-per-capita-payment program violates the Establishment Clause in the first instance because government moneys are *in fact* financing religious education and indoctrination. *Supra* pp. 12-15. To be sure, an *additional* constitutional infirmity in such a government aid program lies in the inevitable public perception that the State is endorsing religious practices and beliefs. But the absence of this additional constitutional infirmity cannot save a government aid program that is for a separate and independent reason unconstitutional.

Beyond that, the argument made by Petitioners/*amici curiae* fails on its own terms, inasmuch as the Ohio Voucher Program does indeed create the public perception that the State is endorsing religious practices and beliefs. Given that over 80% of the schools that receive Voucher Program moneys are sectarian private schools providing a religious education, and that an even higher percentage of the available student places are in such schools, the public perception hardly could be otherwise.

Here again, the Ohio Voucher Program stands in marked contrast to the tuition grant program upheld in *Witters*—where the broad variegated range of educational options available to students, only a small handful of which were sectarian, allowed the Court to conclude that the State *neither* was financing religious education in violation of the Establishment Clause *nor* "confer[ing] any message of [S]tate endorsement of religion" in violation of that Clause. *Witters*, 474 U.S. at 489. *See also id.* at 493 (O'Connor, J., concurring) ("No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief."). *Compare Grand Rapids, supra*, 473 U.S. at 399-400 (O'Connor, J., concurring) ("When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools.").

## III. PETITIONERS' OTHER EFFORTS TO SUPPORT THE OHIO VOUCHER PROGRAM ARE UNAVAILING

(A) In a last-ditch effort to support the Ohio Voucher Program, Petitioners make two additional arguments, both of which are squarely foreclosed by this Court's precedents.

1. According to the Taylor Petitioners, our showing that the Ohio Voucher Program has the effect of advancing religion is not in and of itself legally sufficient to establish an Establishment Clause violation. The Taylor Petitioners contend that the Program passes constitutional muster because "the Program's primary effect is not to subsidize religion, but to broaden educational options for disadvantaged families." Taylor Br. at 28. *See also id.* at 14-15.



The proposition that government aid programs are to be analyzed and judged in such a manner under the Establishment Clause was specifically rejected in *Nyquist*. The appellees there, "focusing on the term 'principal or primary effect' which this Court has utilized in expressing the second prong of the three-part [*Lemon v. Kurtzman*] test," argued "that the Court must decide in these cases whether *the* 'primary' effect of New York's tuition grant program is to subsidize religion or to promote [the State's] legitimate secular objectives." 413 U.S. at 783 n.39 (emphasis added). The *Nyquist* Court responded:

> We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it *also* has the direct and immediate effect of advancing religion. [*Id.* at 783-84 n.39 (emphasis added).]

As the *Nyquist* Court elaborated, a law which has "*a* primary effect that advances religion" violates the Establishment Clause. *Id.* at 774 (emphasis added).

2. On a related tack, Petitioners (joined by the United States and other *amici curiae*) argue that government-aid programs such as the Ohio Voucher Program should not be analyzed and judged under the *Lemon v. Kurtzman* "effect" test at all, but rather under the *Lemon v. Kurtzman* "legislative purpose" test *standing alone*. Taking up Judge Ryan's dissent in the court below, they contend that the tuition grant

program in *Nyquist* failed because the New York Legislature's purpose was to assist financially-troubled sectarian private schools, and that the Ohio Voucher Program should pass muster because the Ohio Legislature's purpose was to broaden the educational options available to low-income students who reside within a troubled public school district. *See* State Br. at 17, 41-44; Taylor Br. at 18-19, 25; Hanna Perkins Br. at 45-47. *See also e.g.* United States Br. at 11, 26-27. This argument flies in the face of *Nyquist*.

First, the legislative findings supporting the New York tuition grant program—*e.g.*, the need to promote a "healthy competitive and diverse alternative to public education"; to give "lower-income families" an equal opportunity "to select among alternative educational systems"; and to safeguard against the "aggravat[ion] [of] an already serious fiscal crisis in public education," *see Nyquist*, 413 U.S. at 764-65—parallel the asserted purposes of the Ohio Voucher Program.

Second, in *Nyquist* and in *Sloan*, the Court readily concluded that the challenged tuition grant programs passed the *Lemon v. Kurtzman* "legislative purpose" test, *see Nyquist*, 413 U.S. at 773-74; *Sloan*, 413 U.S. at 829-30, but, as we have seen, struck down those programs because they had the impermissible *effect* of advancing religion. In so doing, the *Nyquist* Court observed that "the propriety of a legislature's purposes may not immunize from scrutiny a law which . . . has a primary effect that advances religion." 413 U.S. at 774.

(B) Finally, Petitioners and various *amici curiae* take leave of the Establishment Clause and its jurisprudence entirely. They attempt to demonstrate that voucher programs provide an educationally sound response to the problems confronting the Cleveland City School District and urban school districts generally, and they broach the idea (if not the formal argument) that the Ohio Voucher Program should be upheld on that basis.



Were this the appropriate forum for an educational policy debate, we would show that much of what Petitioners/*amici curiae* have to say in this regard is inaccurate or misleading. And we would—because it is so much the better part of logic—explain why alleged panaceas that drain sorely-needed funds from public schools to enable a relatively few students to attend private schools are not a solution to the problems of urban education, but an impediment to the development and the funding of effective solutions to those problems. Evidentiary support for this point is found in, for example, the Brief *Amicus Curiae* in Support of Respondents of the National School Boards Association.

But this is not the appropriate forum for an educational policy debate. This case is about the Establishment Clause—and, specifically, what that Clause has to say about government financing of religious education and indoctrination. In that regard, it is "[t]he responsibility of this Court . . . to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." *Evans v. Abney*, 396 U.S. 435, 447 (1970). The court below was exactly right in stating:

> We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised. We do not, however, have the luxury of responding to advents in educational policy with academic discourse on practical solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us. [State Pet. App. at 10a.]

To be sure, scrupulous judicial enforcement of constitutional limitations may on occasion limit the options that

otherwise would be available to government for dealing with a particular problem, and prevent the implementation of a particular solution that may appear—at least to its proponents—to have great potential. Again, voucher proponents are wrong about that potential, but even if they were right,

> constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But, constitutional lines are the price of constitutional government. [*Agostini*, 521 U.S. at 254 (Souter, J., dissenting).]

*See Nyquist*, 413 U.S. at 788-89 ("However great our sympathy . . . for [parents entitled to aid under the New York tuition grant program] . . . and notwithstanding the high social importance of the State's purposes, . . . neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.") (internal quotations and citations omitted).

## IV. THE CONCLUSION THAT THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE DERIVES FURTHER PERSUASIVE FORCE FROM THE DOCTRINE OF *STARE DECISIS*

As we have shown, the Ohio Voucher Program is *identical*—in all respects deemed constitutionally significant by the Court in its Establishment Clause government-aid program cases—to the New York and Pennsylvania tuition grant programs struck down in *Nyquist* and *Sloan*. Accordingly, it would be necessary to overrule *Nyquist* and *Sloan*—and in turn destroy the coherent doctrinal base that those decisions and *Witters* form—in order to sustain the Ohio Voucher Program. This is unwarranted—first because *Nyquist* and *Sloan* are well-reasoned decisions, solidly grounded in basic Establishment Clause principles—and also because, as decisions of this Court, they carry the added force



of *stare decisis*. And, "while *stare decisis* is not an inexorable command, particularly when [the Court is] interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations and citations omitted). In this connection, two points bear emphasis.

*First*, there is no "special justification" for departing from *Nyquist* and *Sloan* as precedents of this Court. "No evolution of legal principle has left [*Nyquist*'s/*Sloan*'s] doctrinal footings weaker than they were in 1973." *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). To the contrary, *Witters*—the Court's one post-*Nyquist*/*Sloan* Establishment Clause case involving a government program of tuition grants to parents/students—fully embraces *Nyquist* and *Sloan*, and treats them as setting out the proper legal principles for assessing Establishment Clause challenges to this type of government program. *Supra* pp. 21-24, 36-37.

Equally to the point, the *Nyquist*/*Sloan*/*Witters* legal principles have "in no sense proven unworkable." *Casey*, 505 U.S. at 855 (internal quotations omitted). And, those legal principles do not in terms depend on any "factual assumptions" that "time has overtaken." *Cf. Casey*, 505 U.S. at 860. *See also id.* at 861-64. That is not to say that questions do not remain as to the constitutionality of possible tuition grant programs that are less skewed towards religion than the Ohio Voucher Program and the programs struck down in *Nyquist* and *Sloan*, but more skewed towards religion than the program upheld in *Witters*. *See supra* pp. 24-25. But those are line-drawing questions "within judicial competence." *Casey*, 505 U.S. at 855.

*Second*, the Court recognized in *Nyquist* and *Sloan* that the cases before it "involve[d] an intertwining of societal and constitutional issues of the greatest importance," 413 U.S.

at 759, and the Court reiterated its "inability to perceive with invariable clarity the 'lines of demarcation in this extraordinarily sensitive area of constitutional law,'" *id.* at 761 n.5 (*quoting Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). *See also Witters*, 474 U.S. at 485. In so doing, the Court recognized that its decisions in *Nyquist* and *Sloan*, like any judicial decision on any such constitutional question, are not irrefutably right (or wrong) in the sense that a mathematical proof is right (or wrong). This lends greater rather than lesser "persuasive force," *Dickerson*, 530 U.S. at 443, to the doctrine of *stare decisis*.

It is precisely where the Court after due deliberation has established a precedent in a sensitive and difficult area of constitutional law that the Court has been most mindful of the need for continuity in the law, most sensitive to the harm to the law worked by the overruling of precedents based on "a present doctrinal disposition to come out differently from the [prior] Court," *Casey*, 505 U.S. at 864, and most insistent that a break in the law's continuity is warranted only by subsequent developments in the Court's jurisprudence that demand such a break. As we have shown, there have been no such subsequent developments in the Court's post-*Nyquist*/*Sloan* Establishment Clause jurisprudence.



## CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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